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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MARTIN VIESCA,

Defendant and Appellant.

B231281

(Los Angeles County  
Super. Ct. No. NA085125)

APPEAL from judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Martin Viesca appeals from the judgment entered following his conviction by a jury of assault with a deadly weapon with special findings by the court in a bifurcated proceeding that he had suffered one prior serious or violent felony conviction within the meaning of both the “Three Strikes” law and Penal Code section 667, subdivision (a)(1).<sup>1</sup> Viesca contends the trial court erred in denying his motion for judgment of acquittal for insufficient evidence at the close of the People’s case and, in the alternative, there is insufficient evidence to support the jury’s verdict. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

After completing an unrelated traffic stop shortly after midnight on March 20, 2010, Long Beach Police Officer Alfredo Chairez saw Viesca and another man chasing a third man. Viesca was holding a golf club in his left hand and, as he ran, gestured with his right hand toward his waistband as if he had a gun. Viesca, a member of the Barrio Small Town street gang, yelled “Fuck Longos,” the name of a rival gang. The person being chased then disappeared from view. Chairez did not see Viesca get closer than 25 feet to the individual he was pursuing.

As Officer Chairez approached Viesca, he dropped the golf club. Chairez then detained Viesca and his companion, also a member of the Barrio Small Town gang. In response to Chairez’s questions, Viesca said he had gotten into a fight at a bar with two or three members of Longos. (Viesca had been shot by a Longos gang member several years earlier.) When the rival gang members saw Viesca pick up the golf club, they fled; and Viesca gave chase. He admitted he intended to strike the man he was chasing with the club.

Viesca was charged by information filed on April 22, 2010 with a single count of assault with a deadly weapon (§ 245, subd. (a)(1)). The information specially alleged the offense had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and Viesca had one prior serious or violent felony conviction (for making a criminal threat) within the meaning of both the Three Strikes law (§§ 667,

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<sup>1</sup> Statutory references are to the Penal Code.

subds. (b)-(i); 1170.12, subd. (a)-(d)) and section 667, subdivision (a)(1).<sup>2</sup> Viesca pleaded not guilty and denied the special allegations.

The court bifurcated trial of the prior convictions. At the conclusion of the People's case, Viesca moved for a judgment of acquittal under section 1118.1, contending there was no evidence he had the "present ability" to strike the unidentified victim because he had never been closer than 25 feet to him. The motion was denied. The jury found Viesca guilty of aggravated assault and found the gang enhancement allegation not true. Viesca then waived his constitutional rights and admitted the truth of the prior conviction allegations. After denying Viesca's motion to dismiss his strike prior, the court sentenced him to 13 years in state prison.<sup>3</sup>

### DISCUSSION

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) To prove Viesca guilty of an aggravated assault, as charged, the People had to establish he committed "an assault upon the person of another with a deadly weapon or instrument other than a firearm." (§ 245, subd. (a)(1).) Assault is a general intent crime (*People v. Chance* (2008) 44 Cal.4th 1164, 1167 (*Chance*); *People v. Williams* (2001) 26 Cal.4th 779, 782, 784-785), although Viesca admitted to Officer Chairez he intended to "fuck up" the man he was chasing with the golf club. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 214 [assault is a general

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<sup>2</sup> It was also specially alleged Viesca had served a prison term for a prior felony conviction. (§ 667.5, subd. (b).) The court struck this additional enhancement at sentencing.

<sup>3</sup> Viesca was sentenced to the upper term of four years for aggravated assault, doubled under the Three Strikes law, plus five years pursuant to section 667, subdivision (a)(1), for the prior serious felony conviction. An issue regarding Viesca's presentence custody credits, raised in his opening brief, has now been resolved in the trial court.

intent crime “established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery”].)<sup>4</sup>

Challenging both the trial court’s denial of his motion for judgment of acquittal and the sufficiency of the evidence to support the jury’s verdict, Viesca contends he cannot be guilty of aggravated assault because the People failed to prove he had the present ability to use the golf club to inflict violent injury on his fleeing victim. Viesca’s argument reflects a fundamental misunderstanding of this element of the crime of assault.

The Supreme Court extensively discussed “present ability” in the context of the crime of assault in *Chance, supra*, 44 Cal.4th 1164, in which the defendant, like Viesca, had argued he lacked the present ability to commit assault because his conduct did not immediately precede a battery. (*Id.* at p. 1167.) After being pursued by police officers, the defendant had taken cover behind a trailer. One of the officers approached from the back of the trailer and saw defendant facing the front end, holding a gun in his right hand, extended forward and supported by his left hand. The officer trained his own gun on the defendant and told him to drop his weapon. After some hesitation the defendant complied, flipping the gun behind him, but again attempted to flee. He was apprehended after he fell. Upon examining the defendant’s gun, the officers discovered it was fully loaded with 15 rounds in the magazine, but no round in the firing chamber. (*Id.* at pp. 1168-1169.)

The Supreme Court rejected the defendant’s argument he did not have the “present ability” to inflict injury required by section 240 “because he would have had to turn, point his gun at the officer, and chamber a round before he could shoot at [him].” (*Chance, supra*, 44 Cal.4th at p. 1171.) The Court explained its statements in earlier cases distinguishing assault from the doctrine of criminal attempt that “an assault must *immediately* precede the battery” (see, e.g., *People v Williams, supra*, 26 Cal.4th at p. 786; *People v. Colantuono, supra*, 7 Cal.4th at p. 216) “were not intended to and did

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<sup>4</sup> Viesca does not dispute the golf club he was carrying qualifies as a deadly weapon.

not transform the traditional understanding of assault to insulate defendants from liability until the last instant before a battery is completed. Although temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Chance*, at p. 1171.) Thus, "when a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of the injury." (*Id.* at p. 1172.)

As an example of the proper application of this rule, the *Chance* Court cited and discussed *People v. Yslas* (1865) 27 Cal. 630: "In *Yslas*, the defendant approached within seven or eight feet of the victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. Yslas committed assault, even though he never closed the distance between himself and the victim, or swung the hatchet. (*Yslas*, [*supra*, 27 Cal.] at pp. 631, 633-634.)" (*Chance*, *supra*, 44 Cal.4th at p. 1174.) *Yslas* is squarely on point. Viesca committed assault even though he never closed the distance between himself and the victim or swung the golf club. He was "capable of inflicting injury on the given occasion," even though some steps remained to complete the battery and even though the victim thwarted the attack by outrunning his assailant.

### **DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.